

PRESIDING OFFICER'S
RULING NO. C99-1/2

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Complaint on Post E.C.S.

Docket No. C99-1

PRESIDING OFFICER'S RULING ESTABLISHING
INITIAL PROCEDURAL DATES AND
SPECIAL RULES OF PRACTICE

(May 26, 1999)

Commission Order No. 1239 denied a Postal Service Motion to Dismiss this complaint and determined to hold proceedings in conformity with 39 U.S.C. § 3624. Pursuant to that order, United Parcel Service provided a statement indicating that it intended to submit discovery on the Postal Service in order to develop evidence and that it expected to be able to submit its case-in-chief by July 27, 1999. Statement of United Parcel Service Pursuant to Order No. 1239, filed May 13, 1999.

On May 14, 1999, United Parcel Service submitted discovery requests and a motion urging that protective conditions be established to apply to responses that the Postal Service might deem to contain confidential business information. Motion of United Parcel Service for a Protective Order (Motion). The Postal Service filed a response in opposition to this motion on May 25, 1999. United States Postal Service Response to Motion of United Parcel Service for a Protective Order (Response). The Service also filed objections to each of the 24 discovery requests submitted by United Parcel Service.

Procedural Schedule. Complaint dockets initiated under § 3662 are not subject to the 10-month statutory deadline applicable to the Postal Service Requests for recommended decisions on rates. United Parcel Service has indicated that it should be able to file evidence in support of its complaint by July 27, 1999. Allowing slightly more

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than two months for obtaining information through discovery and preparing testimony does not seem unreasonable. Until the Commission and the parties (particularly the Postal Service) know the scope of the direct case, it is not feasible to establish a procedural schedule for all subsequent stages of this case.

Special Rules of Practice. Although no statutory deadline restricts the length of this proceeding, the Commission has always attempted to evaluate complaints promptly. The Commission has successfully used special rules of practice in all of its recent major dockets that avoid unnecessarily long time frames for filing legal pleadings, especially those related to discovery controversies. A copy of the special rules of practice used in the most recent omnibus rate case, Docket No. R97-1, are provided as Attachment A to this ruling. Participants are directed to indicate by June 8, 1999, any reason why these rules should not be made applicable to discovery requests and other pleadings filed after June 14, 1999, and otherwise be fully utilized in this docket.

The United Parcel Service Motion. United Parcel Service offered proposed protective conditions in an attempt to expedite the discovery process. Apparently, it thought the Postal Service might be willing to provide some information subject to protective conditions without fully litigating the applicability of potential grounds for withholding information. The Postal Service Response contends that in the absence of a motion to compel, the pending Motion is premature. Further, the Service requests that it be given an opportunity to prepare and file alternative protective conditions prior to any ruling establishing protective conditions in this case.

As the Postal Service has objected to every discovery question submitted by United Parcel Service, it is evident that the Presiding Officer will be called upon to determine whether, and under what circumstances, United Parcel Service will be able to obtain factual information from the Postal Service in order to prepare evidence. Both United Parcel Service and the Postal Service suggest protective conditions may be necessary if information is to be provided.

I will grant the Postal Service an opportunity to draft and submit preferred protective condition language prior to ruling on the pending motion. The Service should

submit alternate language on or before June 8, 1999. Additionally, both the Postal Service and United Parcel Service are requested to consider whether information on certain subjects requires either less stringent or more stringent protective conditions, and to provide comments discussing when less stringent, or more stringent conditions might be appropriate. Those comments also are to be filed by June 8, 1999.

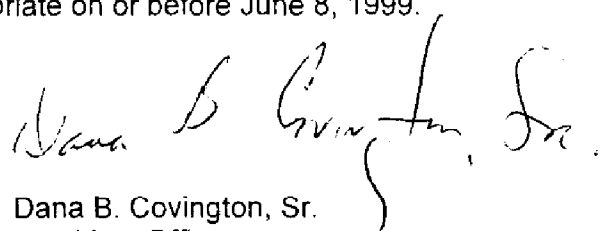
RULING

1. The direct case of Complainant United Parcel Service is to be filed on or before July 27, 1999.

2. Participants are directed to indicate by June 8, 1999, any reason why the special rules provided in Attachment A should not be made applicable to discovery requests and other pleadings filed after June 14, 1999, and otherwise be fully utilized in this docket.

3. The Postal Service, and any other participant wishing to do so, may submit proposed language for protective conditions to be used in this proceeding on or before June 8, 1999.

4. Participants may file comments discussing when less stringent, or more stringent protective conditions might be appropriate on or before June 8, 1999.


Dana B. Covington, Sr.
Presiding Officer

SPECIAL RULES OF PRACTICE

1. Evidence

A. Case-in-chief. A participant's case-in-chief shall be in writing and shall include the participant's direct case and rebuttal, if any, to the United States Postal Service's case-in-chief. It may be accompanied by a trial brief or legal memoranda. There will be a stage providing an opportunity to rebut presentations of other participants and for the Postal Service to present surrebuttal evidence.

B. Exhibits. Exhibits should be self-explanatory. They should contain appropriate footnotes or narrative explaining the source of each item of information used and the methods employed in statistical compilations. The principal title of each exhibit should state what it contains or represents. The title may also contain a statement of the purpose for which the exhibit is offered; however, this statement will not be considered part of the evidentiary record. Where one part of a multi-part exhibit is based on another part or on another exhibit, appropriate cross-references should be made. Relevant exposition should be included in the exhibits or provided in accompanying testimony.

C. Motions to Strike. Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence. All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness, unless good cause is shown. Responses to motions to strike are due within seven days.

D. Designation of Evidence from other Commission Dockets. Participants may request that evidence received in other Commission proceedings be entered into the record of this proceeding. These requests should be made by motion, should explain

the purpose of the designation, and should identify material by page and line or paragraph number. Absent extraordinary justification, these requests must be made at least 28 days before the date for filing the participant's direct case. Oppositions to motions for designation and/or requests for counter-designations shall be filed within 14 days. Oppositions to requests for counter-designations are due within 7 days. At the time requests for designations and counter-designations are made, the moving participant must submit two copies of the identified material to the Secretary of the Commission.

2. Discovery

A. General. Sections 25, 26 and 27 of the rules of practice apply during the discovery stage of this proceeding except when specifically overtaken by these special rules. Questions from each participant should be numbered sequentially, by witness.

The discovery procedures set forth in the rules are not exclusive. Parties are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, by presenting selected written interrogatories and answers for adoption by a witness at the hearing, or by other appropriate means.

In the interest of reducing motion practice, parties also are encouraged to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.

B. Objections and Motions to Compel Responses to Discovery. Upon motion of any participant in the proceeding, the Commission or the presiding officer may compel a more responsive answer, or an answer to an interrogatory or request for admission to which an objection was interposed, if the objection is overruled. Motions to compel should be filed within 14 days of the answer or objection to the discovery

request. The text of the discovery request, and any answer provided, should be provided in the text or as an attachment to the motion to compel.

Parties who have objected to interrogatories or requests for production of documents or items which are the subject of a motion to compel shall have seven days to answer. Answers will be considered supplements to the arguments presented in the initial objection.

C. Answers to Interrogatories. Answers to discovery are to be filed within 14 days of the service of the discovery request. Answers to discovery requests shall be prepared so that they can be incorporated as written cross-examination. Each answer shall begin on a separate page, identify the individual responding, the participant who asked the question, and the number and text of the question.

Participants are expected to serve supplemental answers to update or to correct responses whenever necessary, up until the date that answers are accepted into evidence as written cross-examination. Participants filing supplemental answers shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

Participants may submit responses with a declaration of accuracy from the respondent in lieu of a sworn affidavit.

D. Follow-up Interrogatories. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the initial discovery period ends. They must be served within seven days of receipt of the answer to the previous interrogatory unless extraordinary circumstances are shown.

E. Discovery to Obtain Information Available Only from the Postal Service. Sections 25 through 27 of the rules of practice allow discovery reasonably calculated to lead to admissible evidence during a noticed proceeding with no time limitations. Generally, discovery against a participant is scheduled to end prior to the receipt into

evidence of that participant's direct case. An exception to this procedure shall operate when a participant needs to obtain information (such as operating procedures or data) available only from the Postal Service. Discovery requests of this nature are permissible up to 20 days prior to the filing date for final rebuttal testimony.

3. Service

A. Receipt of Documents. The Service List shall contain the name and address of up to two individuals entitled to receive copies of documents for each participant. If possible that entry will also include a telephone number and facsimile number.

B. Service of Documents. Documents shall be filed with the Commission and served upon parties in accordance with sections 9 through 12 of the Commission's rules of practice. Participants capable of submitting documents stored on computer diskettes may use an alternative procedure for filing documents with the Commission. Provided that the stored document is a file generated in either Word Perfect 5.1 or any version of Microsoft Word, and is formatted in Arial 12 font, in lieu of the requirements of section 10 of the rules, a participant may submit a diskette containing the text of each filing simultaneously with the filing of 1 (one) printed original and 3 (three) hard copies.

C. Exceptions to general service requirements for certain documents. Designations of written cross-examination, notices of intent to conduct oral cross-examination, and notices of intent to participate in oral argument need to be served only on the Commission, the OCA, the Postal Service, and the complementary party (as applicable), as well as on participants filing a special request for service.

Discovery requests and pleadings related thereto, such as objections, motions for extensions of time, motions to compel or for more complete answers, and answers to such pleadings, must be served only on the Commission, the OCA, the Postal Service, the complementary party, and on any other participant so requesting, as

provided in sections 25-27 of the rules of practice. Special requests relating to discovery must be served individually upon the party conducting discovery and state the witness who is the subject of the special request.

D. Document titles. Parties should include titles that effectively describe the basic content of any filed documents. Where applicable, titles should identify the issue addressed and the relief requested. Transmittal documents should identify the answers or other materials being provided.

4. Cross-examination

A. Written cross-examination. Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence.

Designations of written cross-examination should be served no later than three working days before the scheduled appearance of a witness. Designations shall identify every item to be offered as evidence, listing the participant who initially posed the discovery request, the witness and/or party to whom the question was addressed (if different from the witness answering), the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "OCA-T1-17 to USPS witness Jones, answered by USPS witness Smith (March 1, 1997) as updated (March 21, 1997))." When a participant designates written cross-examination, two copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission.

The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel for a witness may object to written cross-examination at that time, and

any designated answers or materials ruled objectionable will be stricken from the record.

B. Oral cross-examination. Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence. Notices of intent to conduct oral cross-examination should be delivered to counsel for the witness and served three or more working days before the announced appearance of the witness, and should include (1) specific references to the subject matter to be examined and (2) page references to the relevant direct testimony and exhibits.

Participants intending to use complex numerical hypotheticals or to question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record. Copies of these exhibits should be delivered to counsel for the witness at least two calendar days (including one working day) before the witness's scheduled appearance.

5. General

Argument will not be received in evidence. It is the province of the lawyer, not the witness. It should be presented in brief or memoranda. Legal memoranda on matters at issue will be welcome at any stage of the proceeding.

New affirmative matter (not in reply to another party's direct case) should not be included in rebuttal testimony or exhibits.

Cross-examination will be limited to testimony adverse to the participant conducting the cross-examination.

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed. Each party should sequentially number items submitted as library references and provide each item with an informative title. Parties

are to file and serve a separate Notice of Filing of Library Reference(s). Library material is not evidence unless and until it is designated and sponsored by a witness.